

IN THE MATTER OF	:	BEFORE THE
SPIRIT MASTER FUNDING,	:	HOWARD COUNTY
III, LLC	:	BOARD OF APPEALS
Petitioner	:	HEARING EXAMINER
	:	BA Case No. 09-029V

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DECISION AND ORDER

On November 16, 2009, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, heard the petition of Spirit Master Funding, III, LLC, for variances to: (1) reduce the 50-foot setback from a street right-of-way to 30 feet for a structure, (2) reduce the 50-foot setback from a street right-of-way to zero ("0") feet for a fence and gravel drive adjacent to Hilder Avenue; and (3) reduce the 50-foot structure and use setback from a public street right-of-way to Zero ("0") feet for a structure, fence, aggregate storage and related structures adjacent to MD 32, in an M-2 (Manufacturing: Heavy) Zoning District, filed pursuant to Section 130.B.2 of the Howard County Zoning Regulations (the "Zoning Regulations").

The Petitioner certified to compliance with the notice, hearing, and posting requirements of the Howard County Code. I viewed the property as required by the Hearing Examiner Rules of Procedure.

David Carney, Esquire, represented the Petitioner. Robert Vogel testified on behalf of the Petitioner. No one appeared in opposition to the petition.

FINDINGS OF FACT

Based upon the evidence presented at the hearing, I find as follows:

1. The subject property is situated on the southwest side of Annapolis Junction Road, about 475 feet east of Dorsey Run Road. It is located in the 6th Election District and is identified on Tax Map 48, Grid 14, as Parcels 36 and 40 and is also known as 10980 Guilford Road (Annapolis Junction Road/MD32) (the "Property").

2. Two parcels comprise the 2.25-acre irregularly shaped Property. The .44-acre Parcel 36 fronts on Guilford Road. Parcel 36 is improved with a one-story office building and about 15 parking spaces on a paved parking lot behind the building. To its west and south is the 1.27-acre Parcel 40, which fronts Hilder Avenue on its east property line and adjoins MD 32 on its south lot line. Parcel 40, the site of the existing concrete batching facility, is mostly paved and gravel and used by the heavy equipment (trucks and loaders) in the operation. Running between the two parcels is White Avenue, a 40-foot wide paper street and a chain link fence.¹

3. The Storage Building. A 50-foot by 40-foot metal storage building lies close to Parcel 40's southern and eastern perimeters. A portion of the storage building encroaches beyond the property line into MD 32, Maryland State Highway Administration ("SHA") property, and the entire building encroaches into the 50-foot setback from MD 32. According to the petition, the prior owner apparently constructed the storage building with a permit. The Petitioner became aware of it three years after purchasing the property. The Petitioner is currently negotiating with SHA to purchase or lease the area

¹ Pursuant to Section 128.A.8 of the Zoning Regulations, the required setback from a street right-of-way shall not be applied to a street shown on a plat recorded before March 7, 1961, but not built, if the Directors of Planning and Zoning and Public Works determines the street will not be built or dedicated as a public street. The petition includes as Exhibit G a letter from Public Works concluding the petition complies with this section.

of encroachment. If the Petitioner acquires the property, the storage building would be set back 8 feet from the MD 32 lot line. In the alternative, the Petitioner is requesting that I exempt the SHA property on the Petitioner's side of the 10-foot fence, or to include some or all of the SHA property within the fence line.

4. Fence, aggregate storage areas and block/concrete walls adjacent to MD 32. A 10-foot high fence encroaches into and runs along MD 32, as do existing aggregate storage areas and their associated walls. The Petitioner is seeking a variance to reduce the 50-foot setback to Zero ("0") feet for these structures and uses.

5. Fence and gravel driveway adjacent to Hilder Avenue. A 10-foot high chain link fence and a gravel driveway lie about 20 feet from the Hilder Avenue property line, causing them to encroach into the 50-foot setback. The Petitioner proposes to relocate the fence and extend the gravel driveway to the property line. The Petitioner is seeking a variance to reduce the 50-foot setback to zero ("0") feet for these structures and uses and the proposed relocation/extension.

6. Vicinal Properties are also zoned M-2. Parcel 120 to the north, across Guilford Road, is the site of the Annapolis Junction Business Park, a series of one-story industrial buildings. The adjoining eastern Parcel 37 is unimproved. To the south is MD 32. The property to the west is the site of a second concrete contracting business.

7. Roads. Guilford Road has four travel lanes and a center turn lane within a variable width right-of-way in the Property's vicinity. The sight distance appears acceptable, which is about 400 feet to the east and about 500 feet to the west.

8. Water and Sewer Service. The Property is served by public water and sewer.

9. The General Plan. The General Plan's 2000-2020 Policies Map designates the Property as "Employment Area/Redevelopment Corridor." Guilford Road is depicted as a Major Collector on the Plan's Transportation Map.

CONCLUSIONS OF LAW

The standards for variances are contained in Section 130.B.2.a of the Regulations. Pursuant to this section, I may grant a variance only if the Petitioner demonstrates compliance with all four variance criteria. Based upon the foregoing Findings of Fact, and for the reasons stated below, I find the requested variances comply with Section 130.B.2.a(1) through (4), and therefore may be granted.

(1) That there are unique physical conditions, including irregularity, narrowness or shallowness of the lot or shape, exceptional topography, or other existing features peculiar to the particular lot; and that as a result of such unique physical condition, practical difficulties or unnecessary hardships arise in complying strictly with the bulk provisions of these regulations.

Compliance with this first criterion is a two-part test. First, there must be a finding that the property is unusual or different from the nature of the surrounding properties. Secondly, this unique condition must disproportionately affect the property such that a practical difficulty arises in complying with the bulk regulations. See *Cromwell v. Ward*, 102 Md. App. 691, 651 A.2d 424 (1995). A "practical difficulty" is shown when the strict letter of the zoning regulation would "unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome." *Anderson v. Board of Appeals, Town of Chesapeake Beach*, 22 Md. App. 28, 322 A.2d 220 (1974).

In this case, the TSR observes that the requested variances are concentrated on the 1.27-acre "L" shaped Parcel 40 and that the concrete batching operation utilizes the entirety of Parcel 40 to accommodate the aggregate storage areas and the large, heavy vehicle/equipment uses in the operation, according to DPZ aerial photographs.

Parcel 40 is a relatively small parcel for a commercially zoned property and is relatively shallow in the area adjoining Hilder Avenue. The parcel's shallowness and its size are unique physical conditions causing the Petitioner practical difficulties in strictly with the setback regulations, in accordance with Section 130.B.2.a(1).

(2) That the variance, if granted, will not alter the essential character of the neighborhood or district in which the lot is located; will not substantially impair the appropriate use or development of adjacent property; and will not be detrimental to the public welfare.

Vicinal properties are developed with similar intensive commercial and industrial uses. Additionally, the encroachments are not visible from MD 32 owing to a dense vegetative buffer. I therefore conclude the requested variances will not alter the essential character of the neighborhood or district nor substantially impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare, in accordance with Section 130.B.2.a(2).

(3) That such practical difficulties or hardships have not been created by the owner provided, however, that where all other required findings are made, the purchase of a lot subject to the restrictions sought to be varied shall not itself constitute a self-created hardship.

The Petitioner purchased the Property with the existing encroachments, and the Property's narrowness cause practical difficulty in complying strictly with the setback regulations, in accordance with Section 130.B.2.a(3).

(4) That within the intent and purpose of these regulations, the variance, if granted, is the minimum necessary to afford relief.

With the exception of the Petitioner's desire to relocate the fence and extend the gravel driveway to the property line, no changes to the structures are uses are proposed. The variances are the minimum necessary to afford relief, in accordance with Section 130.B.2.a(4).

II. The Petitioner's Alternative Proposal

In the alternative, the Petitioner is requesting an exemption for the SHA property on the Petitioner's side of the 10-foot fence, or to include some or all of the SHA within the fence line. Because the State is already exempt from Howard County's Zoning Regulations as a matter of law, the exemption is unnecessary. The requested variance to reduce the applicable setback to zero feet will provide the relief sought by the Petitioner should it lease or purchase the state property.

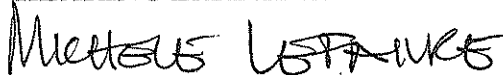
ORDER

Based upon the foregoing, it is this **23rd day of November 2009**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the Petition of Spirit Master Funding, III, LLC, to: (1) reduce the 50-foot setback from a street right-of-way to 30 feet for a structure, (2) reduce the 50-foot setback from a street right-of-way Zero ("0") feet for a fence and gravel drive adjacent to Hilder Avenue; and (3) reduce the 50-foot structure and use setback from a public street right-of-way to Zero ("0") feet for a structure, fence, aggregate storage and related structures adjacent to MD 32, in an M-2 (Manufacturing: Heavy) Zoning District are hereby **GRANTED**, subject to the following condition.

1. The variances will apply only to the uses and structures being requested and not to any new structures, uses, or change in uses on the subject property or to any additions thereto.

**HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER**



Michele L. LeFaivre

Date Mailed: _____

Notice: A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 days of the issuance of the decision. An appeal must be submitted to the Department of Planning and Zoning on a form provided by the Department. At the time the appeal petition is filed, the person filing the appeal must pay the appeal fees in accordance with the current schedule of fees. The appeal will be heard *de novo* by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing.